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NO. 1236

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

Office-Supreme Court, U.S.
FILED
MAR 15 1968
JOHN F. DAVIS, CLERK

GEORGE DELONEY and
HARRIETT DELONEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

Charles B. Evins
R. Eugene Pincham
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Harriett Deloney and
George Deloney

No.

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SUPREME COURT OF THE UNITED STATES
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HARRIET DELONEY,

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STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Charles B. Levine,
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Harriet Deloney and
George Deloney.

NO.

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MAY IT PLEASE THE COURT:

(a) OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, reported at F. 2d. is printed at Pages 1 to 3 of the Transcript of Record.

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SUPREME COURT OF THE UNITED STATES
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(b) JURISDICTION

The Opinion and Judgment of the Court of Appeals for the 7th Cir., affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on January 25, 1968. (R.4). Petitioners' Petition for Re-Hearing was denied on February 14, 1968. (R. 15). On February 19, 1968, the Court allowed Petitioners' motion for a stay of mandate pending filing of a petition for a writ of certiorari to this Court.

The jurisdiction of this Court is invoked under 28 U.S.C., Para 1254 (1).

(c) CONSTITUTIONAL PROVISIONS INVOLVED

THE SIXTH AMENDMENT:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial***, and to be informed of the nature and cause of the accusation;***"

THE FIFTH AMENDMENT:

> "No person shall be held to answer for a capital, or otherwise infamous crime, *** nor be deprived of life, liberty, or property without due process of law;***."

(d) QUESTIONS PRESENTED FOR REVIEW

1. Is the Sixth Amendment constitutional guarantee that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial***, and to be informed of the nature

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(d) QUESTIONS PRESENTED FOR REVIEW

1. Is the Sixth Amendment constitutional guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial***, and to be informed of the nature

and cause of the accusation; ***, violated where an accused is not charged or informed of his being suspected of committing a crime until approximately six months after the commission of the last act on his part which formed the basis of the substantive violation subsequently placed against him?

2. Must one charged with a crime some six months after the commission of the last substantive act charged in the indictment, who moves to dismiss the indictment for reason of the government's purposeful, unexplained and unnecessary delay in bringing the charge or informing the defendant of the pendency of the charge prove his Sixth Amendment constitutional rights were prejudiced by such delay, or should not the government be required, upon the issue being properly raised, to give some evidence as to the reasons for the delay in order that the court may make a considered judgment as to whether such delay was unnecessary, deliberate, unreasonable, oppressive or prejudicial?

3. Where a conflict exists between the Circuits on the necessity of a defendant showing prejudice where he raises a question of the violation of his Sixth Amendment constitutional right to a speedy trial, one Circuit holding that a defendant must show prejudice in order to be entitled to relief, the others holding that the government, the issue being raised, is required to show that the delay was not deliberate or oppressive, is not a decision from this Court necessary to resolve said conflict?

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(e) STATEMENT OF CASE

The government alleged in the indictment that the defendants sold narcotic drugs to an agent on March 23, and April 7, 1965, in violation of the narcotic laws, 26 U.S.C., Para. 4705 (a); 21 U.S.A., Para 174. The indictments were filed against Defendants almost six months after the commission of the last substantive act alleged in the indictments, to-wit: September 29, 1965. The filing of the indictments was the first notice to defendants that they were suspected of committing a crime, or were to be charged.

Timely motions to dismiss for the government's unreasonable, wilful and deliberate delay in bringing the charge and informing the defendants thereof were filed. The motions also alleged the delay as prejudicing defendants' rights to defend themselves and requested a pre-trial hearing by the court to determine this issue. The trial court, although recognizing that the Sixth Amendment could under some circumstances be violated by reason of an unreasonable governmental delay in bringing a charge, overruled the motions, without a hearing, on the grounds that the defendants had failed to sustain their burden of showing prejudice and that "Despite conclusatory allegations of loss of memory, absence of witnesses, etc., defendants have produced no "sifted evidence and demonstrated facts" to justify their position. On appeal to the Court of Appeals, 7th Circuit, the Court affirmed the finding of guilty. In its opinion, (R. 2), the Court stated:

(c) STATEMENT OF CASE

The government alleged in the indictment that the defendants sold narcotic drugs to an agent on March 26, and April 7, 1955, in violation of the narcotic laws, 26 U.S.C., Para. 4705 (a); 21 U.S.C.A., Para 174. The indictments were filed against Defendants almost six months after the commission of the last substantive act alleged in the indictments, to-wit: September 29, 1955. The filing of the indictments was the first notice to defendants that they were suspected of committing a crime, or were to be charged.

Timely motions to dismiss for the government's unreasonable, wilful and deliberate delay in bringing the charge and informing the defendants thereof were filed. The motions also alleged the delay as prejudicing defendants' rights to defend themselves and requested a pre-trial hearing by the court to determine this issue. The trial court, although recognizing that the Sixth Amendment could under some circumstances be violated by reason of an unreasonable governmental delay in bringing a charge, overruled the motions, without a hearing, on the grounds that the defendants had failed to sustain their burden of showing prejudice and that "Lesapte corroboratory allegations of loss of memory, absence of witnesses, etc., defendants have produced no 'affirmative evidence and demonstrated facts' implicitly showing; On appeal to the Court of Appeals, the Court affirmed finding of guilty in its opinion, (R. 2), the Court stated:

"It is apparent the judges of the Court of Appeals for the District of Columbia Circuit have held a variety of views on the subject. *** We think we can distill from these decisions the rule that before the court will dismiss an indictment because of pre-indictment delay, an accused must show he has been prejudiced by the delay. Then, the burden is on the government to show the delay was the result of a valid police purpose."

(f) SUMMARY OF ARGUMENT

Prior to trial the defendants filed motions to quash and dismiss the indictments. The basis for the motion, among other things, was the fact that the charge alleged March 23rd and April 7th, 1965 as the dates on which the offenses allegedly occurred. The indictments in this cause were returned on September 29, 1965. It is respectfully contended that this deliberate, unreasonable, unnecessary, unexplained and wilful delay on the part of the government in bringing the charges against the defendants violated the Fifth and Sixth Amendments constitutional rights of the defendants.

We urge error for the trial court's failure to conduct a hearing and require the government to explain its delay. We further contend that by forcing the burden on defendants to show prejudice the Court permits the government unbounded discretion as to when to bring a charge, limited by the Statute of Limitations and that such prosecutorial discretion is not subject to proper judicial scrutiny as to reasonableness.

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There is an unreconcilable conflict between the Circuits in this area. The Court of Appeals for the District of Columbia in Ross vs. U.S., 349 F. 2d, 210, 211,(D.C.C.R., 1965), required the trial court to condict a hearing to determine why the governmental delay and was such delay prejudicial? The Court of Appeals, (10th Cir.), in Hampton vs. Okla., 368 F. 2d. 9, ruled that the issue of pre-indictment delay having been raised, the trial court should have held a hearing to determine the reason for delay in the bringing of the charge.

The Court of Appeals, (7th Cir.), has taken the position that a defendant, must not only allege but show prejudice before the government will be required to show that the pre-indictment delay "was the result of a valid police purpose."

(g) ARGUMENT

The indictments in the instant cause charge the defendants with violations of the United States Code, 26 U.S.C., Para 4705 (a); 21 U.S.C., Para. 174, and alleges that the acts for which the defendants were indicted occurred on March 23rd and April 7th, 1965, respectively. The indictment herein was filed on September 23, 1965, almost six months after the commission of the last act alleged. This was the first time that defendants were on notice of the pendency of charges against them.

The defendants filed, on October 11, 1965, at the time of arraignment, their motions to dismiss, alleging, inter alia, that the indictment should be

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(3) ARGUMENT

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The defendants filed, on October 11, 1965, a motion of particulars, their motions to dismiss, alleging, inter alia, that the indictment should be

dismissed because of the government's unreasonable, wilful and deliberate delay in bringing the charges against them and in informing and advising them of said charges. In their motions the defendants relied upon the Fifth and Sixth Amendments to the Constitution of the United States, and upon Rule 48 (b) of the Federal Rules of Criminal Procedure.

Rule 48 (b) of the Federal Rules of Criminal Procedure, which is intended to administratively implement the constitutional provisions of the Sixth Amendment mandate of an accused's constitutional right to a "speedy trial", provides that,

> "IF THERE IS UNNECESSARY DELAY IN PRESENTING THE CHARGE TO A GRAND JURY, or in filing an information against a defendant who has been held to answer to the District Court, OR IF THERE IS UNNECESSARY DELAY IN BRINGING A DEFENDANT TO TRIAL, THE COURT MAY DISMISS THE INDICTMENT, INFORMATION OR COMPLAINT." (Emphasis ours).

The defendants' motions were also addressed to the trial court's inherent powers to supervise the activities of the law enforcement arm of the government insofar as those activities related to criminal proceedings brought within the jurisdiction of the court and in relation to the methods and means employed by Federal law enforcement officers in obtaining evidence against a defendant and in bringing such defendant before the bar of the Court. McNabb vs. U.S., 318 U.S. 332; Rea vs. U.S., 350 U.S. 214; U.S. vs. Sherman, 356 U.S. 369; Rochin vs. California, 342 U.S. 165. The

dismissed because of the government's unreasonable, wilful and deliberate delay in bringing the charges against them and in informing and advising them of said charges. In their motion the defendants relied upon the Fifth and Sixth Amendments to the Constitution of the United States, and upon Rule 48 (b) of the Federal Rules of Criminal Procedure.

Rule 48 (b) of the Federal Rules of Criminal Procedure, which is irrelevant to administratively implement the constitutional provisions of the Sixth Amendment right to a speedy trial, provides that,

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The defendants' motions were also addressed to the trial court's discretionary power to supervise the activities of the law enforcement arm of the government [illegible] activities of the prosecution and to dismiss the indictment with prejudice in the event of unjustifiable delay between the time of arrest and the time of indictment, information or complaint.

motions alleged prejudice to the defendants by reason of the pre-indictment delay, that such delay was deliberate, purposeful, intentional and oppressive and requested the court to hold a hearing to determine the issue involved. The government denied that defendants had been prejudiced since the indictments had been brought within the period of the Statute of Limitations and that this Statute was determinative of the issues raised by defendants' motion to dismiss. The trial court held that since the defendants had not shown any prejudice by virtue of the pre-indictment delay and had not shown any hard evidence of prejudice, the motions would be denied. The Court of Appeals (7th Cir.) affirmed.

The phrase "speedy trial", as it is concerned with the right of an accused to have his guilt quickly and rapidly determined, is more than euphemistic phraseology. It has been recognized to mean in its most strict sense a quick and rapid trial. The application of the principal of speedy trial has long been a source of concern to all who believe in the concept of constitutional liberty. This disquietude is reflected in the continual awareness and interest of the American Bench and Bar with the administration of criminal justice. The American Bar Association funded a project in 1964 called the "Project on Minimum Standards for Criminal Justice." One of the subjects commissioned for study, as a priority matter, was that of the question of speedy trial. The Sub-Committee Report on this question stated:

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"It has been pointed out that if the right to speedy trial comes into operation only upon being charged or held to answer, then police or prosecutor may circumvent the requirement that there be a speedy disposition of the defendant's case by merely delaying the arrest or charge. It has also been observed that the defendant who is the object of a delayed arrest or charge may be prejudiced or disadvantaged in essentially the same way as a defendant who is not promptly tried after being charged or held to answer. *** INDEED, IF THE UNCHARGED DEFENDANT IS COMPARED WITH A DEFENDANT WHO KNEW HE WAS CHARGED BUT WAS NOT BROUGHT TO TRIAL PROMPTLY THEREAFTER, THE FORMER MAY BE AT AN EVEN GREATER DISADVANTAGE BECAUSE HE IS NOT PROMPTED TO PRESERVE HIS DEFENSE." (Emphasis ours).

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, tentative draft, May, 1967, Section 2.2 (a), P. 22.

The issue of the application of the mandate of the Sixth Amendment to a defendant's right to a speedy trial being a fundamental and elemental right is now settled and not subject to dispute. Cf Klopfer vs. North Carolina, _____ U.S. ____ 18 L. Ed. 2d. 1, 87 S. Ct. _____ .

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The issue of the application of the mandate of the Sixth Amendment to a defendant's right to a speedy trial is now vested and not subject to dispute. Cf. Klopfer v. North Carolina, ____ U.S. ____, 18 L. Ed. 2d. 1, 87 S. Ct. ____.

In the instant case the last criminal act alleged occurred on April 7, 1965. The indictment was returned on September 29, 1965, a period of almost six months. There was no question of the defendants being held to the Grand Jury, which would have put them on notice of the probability of their having to defend themselves and would have thus allowed them to have gone about preserving such defenses as they had. More important to the resolution of the issue involved, however, is the position of the government. At no point in the entire proceedings has the government borne its burden of adequately, or for that matter, at all, explaining the pre-indictment delay. No question exists that the delay was necessitated by the requirement of effective law enforcement, the government made no showing as to whether there was any basis for their delay of almost six months in securing an indictment against the defendants. The government made no showing which would contradict the purposefulness of its delay in bringing the prosecution against the defendants. All of these are questions which the government should have been required to answer before the trial judge in order that he might make a determination of whether the delay was purposeful, unnecessary, prejudicial or oppressive, and thus barred by the mandate of the Sixth Amendment.

As was stated by Mr. Justice Wright in his concurring opinion in Nickens vs. U.S., 323 F. 2d. 808, in commenting on the fact that the trial court had directed the government to bring out "whether there was any basis for waiting eight months to file a complaint, at Page 814:

"Total control of the evidentiary situation by the government, of course, makes for an air-tight case. But when delay in the prosecution intervenes, this air-tight trap may blindly close on the wrong man. Error becomes more possible with each passing day, and a person caught by mistake in the air-tight trap may indeed be helpless. *** Since the possibility of abuse of the government's control over the evidence exists, the court must remain vigilant to scrutinize delay, for the preservation of the purity of its own temple belongs only to the court. *** The trial court here quite properly put the burden on the government to justify the delay. The government must show that there was no more delay that is reasonably attributable to the ordinary processes of justice. *** A SHOWING OF PREJUDICE IS NOT REQUIRED WHEN A CRIMINAL DEFENDANT IS ASSERTING A CONSTITUTIONAL RIGHT UNDER THE SIXTH AMENDMENT. *** ON THE CONTRARY THE GOVERNMENT BEARS THE BURDEN OF PROVING THAT THE ACCUSED SUFFERED NO SERIOUS PREJUDICE BEYOND THAT WHICH ENSUED FROM THE ORDINARY AND INEVITABLE DELAY." (Emphasis supplied).

In the instant case the learned trial court nor the Court of Appeals did not require the government to shoulder its burden to the contrary. They shifted the government's burden to the defendants.

In ROSS vs. U.S., 349 F. 2d. 210, the defendant was convicted of a narcotic violation and appealed. The facts were that defendant had sold narcotics to a

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policeman on May 10, 1962. A complaint against the defendant was sworn out on December 5, 1962, some seven months after the incident. On appeal the case was remanded to the District Court for supplementation of the record on the question of the reasonableness of the delay in apprising the defendant of the charges against him and the effect of that delay on the defendant's ability to defend against the charges. A hearing was held and findings of fact and conclusions of law made. On the second appeal in which the defendant again contended that his Fifth and Sixth Amendment constitutional rights were violated the Court reversed. The Court said at page 211:

> "Upon the record as supplemented, appellant renewed his contentions that the deliberate and purposeful delay between offense and complaint violated rights guaranteed by the Fifth and Sixth Amendments. We put the latter to one side because we think a record of this kind more accurately may be taken as presenting a question akin to a Fifth Amendment due process issue, centering around appellant's ability to defend himself. As recently as two years ago, a majority opinion of this Court disclaimed any purpose to suggest that delay between offense and prosecution could not be so oppressive as to constitute a denial of due process, *** Although it has not been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused***". Nickens vs, U.S., 116 U.S. App. D.C. 338, 340 n 2, 323 F. 2d. 808, 810 n 2, (1963).

policeman on May 15, 1962. A complaint against the defendant was sworn out on December 5, 1962, some seven months after the incident. On appeal the case was remanded to the District Court for supplementation of the record on the question of the reasonableness of the delay in apprising the defendant of the charges against him and the effect of that delay on the defendant's ability to defend against the charges. A hearing was held and findings of fact and conclusions of law made. On the second appeal in which the defendant again contended that his Fifth and Sixth Amendment constitutional rights were violated the Court reversed. The Court said at page 211:

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In Hampton vs. Oklahoma, 368 F. 2d. 9, decided by the 10th Circuit, the appellant, a State prisoner, sought release on a petition for habeas corpus. He asserted in a brief accompanying his petition that nearly nine months passed between the filing of information against him and the date of his trial, and that he was denied the speedy trial guaranteed him by the Sixth Amendment. The District Court summarily denied, without an evidentiary hearing, the writ. On appeal to the 10th Circuit the Court reversed for hearing, stating at pages 11 and 12:

> "***In the brief signed and filed by petitioner in support of his application, there were allegations, which uncontroverted and unexplained, were sufficient to raise a substantial question.*** An evidentiary hearing under the circumstances should have been held if the facts in the brief warranted one. Here, enough appeared***to require an examination of the circumstances at an evidentiary hearing and the making of findings of fact."

In the instant case there is no explanation in the record for the almost six months delay between the offense and indictment. This lack of explanation and the lack of even a denial as to its being deliberate, purposeful and without any real cause is significant and the government's conduct is forbidden by the Sixth Amendment.

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The Court of Appeals, 6th Circuit, takes a contrary view. The decision of that Court in Hoopengarner vs. U.S., 270 F. 2d. 465, 469, is to the effect that the question of pre-indictment delay is not covered by Rule 48 (b) of the Federal Rules of Criminal Procedure nor by the Sixth Amendment, nor presumably by the Fifth Amendment, but is rather measured by the applicable Statute of Limitations. The Court of Appeals, 7th Circuit adopts the view point of the 6th Circuit. In U.S. vs. Panczko, 367 F. 2d. 737, where it is stated that "the government is entitled to a reasonable time to investigate and prepare a case for prosecution limited ONLY by the Statute of Limitations***." The Court followed its rule in U.S. vs. Evans, _____ F. 2d. _____ (No. 16014, 9/28/67). In the instant case, the 7th Circuit limits the effect of its decisions in PANCZKO and EVANS by retreating somewhat from its previous position when it states, (R.3):

> "The use of the words 'reasonable time' and 'only' in the same sentence, may be somewhat confusing. We think we should concede that it is possible to conceive of a delay less than the period of the Statute of Limitations that would be so unreasonable and the prejudice to the defendant so great, that relief under the Fifth Amendment should be afforded. But this is not the instant case, nor was any such case presented in PANCZKO or EVANS."

The limiting effect, however, is not tantamount to a retrenchment from its position that the defendant must first show prejudice before the government is required to make any showing as to the reasons for delay. This view is diametrically opposed to the views of the District of Columbia Court of Appeals and that of the Court of Appeals, 10th Circuit.

(h) CONCLUSION

Because of the opposing views in the Circuits on this issue and because the constitutional concepts involved herein have far-reaching effects on the rights of those of your petitioners, as well as those of many defendants now and in the future, we pray that the writ be granted.

Respectfully submitted,

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Attorneys for Petitioners,
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APPENDIX

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Appendix 1

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 16090 - September Term, 1967 -January Session 1968

UNITED STATES OF AMERICA,	) Appeal from
	) the United States
Plaintiff-Appellee	) District Court
	) for the Northern
vs.	) District of Illi-
	) nois, Eastern
GEORGE DELONEY and	) Division
HARRIETT DELONEY,	)
	)
Defendants-Appellants.	)

January 25, 1968

Before Hasting, Chief Judge, Duffy and Knoch, Senior Circuit Judges.

Duffy, Senior Circuit Judge. Defendants were charged in a 4-count indictment with violations of the narcotic laws, 26 U.S.C., Sec. 4705 (a); 2 U.S.C, Section 174. Two of the counts in the indictment charged an offense alleged to have occurred on March 23, 1965.

Appendix

FILED

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CE [illegible] and

[illegible],

Defendants-Appellants.

January 20, 19[illegible]

Before Hastings, Chief Judge, Duffy and Kiley,

Senior Circuit Judges.

Duffy, Senior Circuit Judge. Defendants were charged in a 4-count indictment with violations of the narcotic laws, 26 U.S.C. Sec. [illegible](a); 21 U.S.C. Section, 174. Two of the counts in the indictment charged an offense alleged to have occurred on March 12, 1965.

The other two counts charged an offense alleged to have occurred on April 7, 1965. After a trial, the jury found the defendants guilty as charged.

Prior to the trial, defendants filed a motion to quash and dismiss the indictment. The basis for the motion was that although the offenses were alleged to have occurred on March 27 and on April 7, 1965, the indictment was not returned until September 29, 1965, a period of approximately six months. The motion charged the "...unnecessary, unexplained and wilful delay on the part of the Government in bringing the charges... violated the Federal Rules (Rule 48 (b) of the Federal Rules of Criminal Procedure) and also the Fifth and Sixth Amendment constitutional rights of the defendants."

The motion for dismissal filed by defendants made no claim of prejudice. The trial court denied the motion subject, however, to reconsideration if there were sufficient showing of prejudice when the case was tried. No such showing was made.

The principal issue to be decided on this appeal is whether the two defendants were denied due process and a fair trial by reason of a six-month pre-indictment delay.

Defendants rely principally on Ross vs. United States, 349 F. 2d. 210, 211 (D.C. Cir., 1965). The Court there described the issue as a Fifth Amendment due process issue, "centering around appellant's ability to defend himself." In ROSS, the Court of Appeals reversed the District Court's decision that the pre-indictment delay was reasonable, and there was no showing of prejudice by the defendant.

The Government cites eleven opinions of the Court of Appeals for the District of Columbia, subsequent to ROSS, in which it claims that Court has ruled

The Government cites eleven opinions of the Court of Appeals for the District of Columbia, subsequent to ROSE, in which it claims that Court has ruled

that pre-indictment delays of approximately the same length of time as in the instant case, did not amount to a denial of the defendant's rights to due process and a fair trial. Furthermore, Powell vs United States, 352 F. 2d. 705 (D.C. Cir., 1965) is cited as criticizing the ROSS decision.

It is apparent the judges of the Court of Appeals for the District of Columbia Circuit have held a variety of views on the subject. In the eleven decisions cited, there were four concurring opinions and three dissenting opinions, some of which have been vigorously expressed. We think we can distill from these decisions the rule that before that Court will dismiss an indictment because of pre-indictment delay, an accused must show he has been prejudiced by the delay. Then, the burden is on the Government to show the delay was the result of a valid police purpose.

This Court has considered the question in United States vs. Panczko, 367 F. 2d. 737 (7 Cir., 1966) and in United States vs. Evans, ___ F. 2d. ___ (No. 16014, 9/28/67). In PANCZKO, the pre-indictment delay was fourteen months. In EVANS, the delay was ten and a half months before the indictment was filed.

In PANCZKO, which involved dealing in counterfeit money, we did say the Government is entitled to a reasonable time to investigate and prepare a case for prosecution limited only by the Statute of Limitations which, in that case, was five years. The use of the words "reasonable time" and 'only' in the same sentence may be somewhat confusing. We

think we should concede that it is possible to conceive of a delay less than the period of the Statute of Limitations that would be so unreasonable and the prejudice to defendant so great, that relief under the Fifth Amendment should be afforded. But this is not the instant case, nor was any such case presented in PANCZKO or EVANS.

It is apparent that some pre-indictment delay usually is necessary to the effective prosecution of certain crimes such as counterfeiting or narcotic offenses. In such cases, there is a great necessity, in the public interest, to use under-cover agents and informers in order to reach the source of the contraband. Some delay is inevitable.

In the instant case, defendants seem to argue that they need not show prejudice. No court decisions have been cited to sustain this contention. We believe there are no such decisions. In any event, we reject this argument.

Defendants raise a second issue claiming the remarks made by the Government prosecutor to the jury were improper and prejudicial. We hold these statements were directly related to the issues raised by the defense and to the general issue of defendants' credibility. We hold there was no error in this respect.

The judgment of conviction is

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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No. 1336

In the Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE DELONEY AND HARRIET DELONEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1236

GEORGE DELONEY AND HARRIET DELONEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1968. A petition for rehearing was denied on February 14, 1968. On March 15, 1968, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a delay of less than six months between the date of violation and the arrest constitutes denial of a speedy trial.

296-974—68

STATEMENT

After a jury trial in the Northern District of Illinois, petitioners were convicted on each count of a four-count indictment which charged illegal sales and transportations of narcotic drugs (26 U.S.C. 4705(a), and 21 U.S.C. 174) on two separate occasions, March 23, and April 7, 1965. On November 15, 1966, each petitioner was sentenced to concurrent sentences of imprisonment for fifteen years.

The evidence at trial showed that Mrs. Jones, a government informer who had known petitioners for fifteen years, was advised by petitioner Mrs. Harriet Deloney that she had heroin for sale (R. 17, 34, 49, 53, 101). On each of the dates charged, the informant, with Narcotic Agent Jackson listening in, called Mrs. Deloney and then went to the Deloney apartment with the agent posing as her "guy." (R. 74, 121, 29, 128). On March 23, the agent gave $300 to Mrs. Deloney who turned the money over to her husband, petitioner George Deloney (R. 22, 122). He left the apartment. After he telephoned, Mrs. Deloney told the agent where to get the "stuff" (R. 25, 123, 125). On April 7, 1965, the agent gave $300 to Mr. Deloney (R. 29). He then told them to return to the informant's home and wait. After receiving a telephone call from the wife (R. 30), they returned to the Deloney apartment where delivery was made (R. 31, 131).

Both petitioners testified that they had never sold drugs to Agent Jackson (R. 293, 328) and that the first time they saw him was when he arrested them in September 1965 (R. 288, 320). Both said Mrs.

Jones had visited them in March or April 1965 and asked them to sell her drugs (R. 291, 305, 323–325), but they had heard that she was an informer and refused to furnish her with narcotics (R. 306, 393, 325).

Petitioners were arrested on September 14, 1965 and indicted on September 23rd. Their motion to dismiss the indictment because of the period of delay from time of the offense (April, 1965) to the date of arrest was denied by the district court, subject to reconsideration at trial, if the defendants could show that they had been prejudiced by the delay. The court of appeals affirmed.

ARGUMENT

Petitioners were not entitled to have the indictment dismissed on a mere showing of a six month interval between offense and arrest. This Court has observed that, where there has been pre-arrest delay, the statute of limitations "is usually considered the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell,* 383 U.S. 116, 122. There is substantial support for the view that the protection of the Sixth Amendment, like that of Rule 48(b), F.R. Crim. P., is addressed exclusively to the post-arrest situation. See, e.g. *Nickens* v. *United States,* 323 F. 2d 808 (C.A.D.C.); *Harlow* v. *United States,* 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814; *Foley* v. *United States,* 290 F. 2d 562 (C.A. 8), certiorari denied, 368 U.S. 888. At all events, there is no support for the view that a defendant may assert pre-arrest delay as a bar to a prosecution commenced within the applicable period

of limitations without demonstrating that he has been materially prejudiced thereby. See Memorandum for the United States in Opposition, *Feinberg* v. *United States,* No. 854, this Term, certiorari denied January 15, 1968. As this Court noted in disposing of a claimed right to swift arrest in *Hoffa* v. *United States,* 385 U.S. 293, 310: "There is no constitutional right to be arrested." Hence, without some showing of prejudice to the defense, there is no reason why the government should be called upon to explain, nor a court required to consider, whether an indictment brought within the applicable limitations period could or should have been brought sooner.

Petitioners' argument that an earlier arrest and indictment would have permitted the preservation of defenses (Pet. 10), is not supported by the specification of any possible defense that was lost by the delay and is refuted by their own testimony at trial. Petitioners denied categorically that Agent Jackson had been in their apartment and recalled comprehensively their version of their conversations with Mrs. Jones and their refusal to sell her drugs. *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.), relied on by petitioners, is distinguishable. There, the defendant asserted a lack of memory as to his whereabouts when he allegedly violated the law, and the buying agent had no personal recollection of his dealings with the defendant and had to rely on notes made months earlier. The dangers evident in such a factual situation, involving lack of memory and difficulties of cross-examination, are not present here. Petitioners did not show any diminution of memory and the

agent, who testified from personal recollection, was corroborated by the informant, as well as, by a surveilling agent who observed part of each incident.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968